



October 14, 1999

Mr. Paul C. Sarahan
Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR99-2922

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under the, Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 128877.

The Texas Natural Resource Conservation Commission (the "Commission") received a request for "all the reports regarding the June 28, 1999 chemical spill accident which occurred at 7803 S. Cage Blvd., Pharr, Texas." You state that the Commission has made available to the requestor portions of the requested information. You assert information you refer to as "Enforcement Action Referrals" is excepted from disclosure based on sections 552.103 and 552.107(1) of the Government Code.

The Seventy-Sixth Legislature amended section 552.103 of the Government Code, effective September 1, 1999. Act of May 25, 1999, 76th Leg., R.S., S.B. 1851 § 6. However, the former law is continued in effect for purposes of requests for attorney general decisions made before the effective date of the amendment. *Id.* § 36. Section 552.103(a) of the Government Code as it read before the amendment, states as follows:

(a) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997), *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 (1991) at 7.

You inform us that an administrative enforcement action by the Commission against three respondents, Intertransport, Inc., Grupo Gor, and Copeland Corp is pending. You state that if the respondents do not enter into an agreement, the cases will be heard at the State Office of Administrative Hearings. In this instance, you have made the requisite showing that the requested information relates to litigation for purposes of section 552.103(a). The Commission may therefore withhold the requested records from public disclosure.¹

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/nc

¹If the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). However, if the records contain information that is confidential by law, you must not release such information even at the conclusion of the litigation. Gov't Code §§ 552.101, .352

Ref.: ID# 128877

Encl. Submitted documents

cc: Mr. Eduardo Anaya
7801 South Cage Boulevard, Suite 101
Pharr, Texas 78577
(w/o enclosures)